

STATE OF MICHIGAN
COURT OF APPEALS

DARLENE FRAIM,

Plaintiff-Appellee,

V

CITY SEWER OF FLINT a/k/a CITY SEWER
CLEANERS OF MID-MICHIGAN, INC.,

Defendant-Appellant.

UNPUBLISHED

September 22, 2005

No. 253073

Genesee Circuit Court

LC No. 02-074645-NO

Before: Hood, P.J., and White and O’Connell, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted the circuit court’s order denying its motion for summary disposition. We affirm.

Plaintiff is employed as a meat stocker in the meat department of a Meijer store in Lapeer, Michigan. Meijer hired defendant to repair some drains in the meat department of that store. On the day in question, plaintiff walked into the meat department’s “meat room,” holding a meat tray, to refill her tray and restock the meat counter. After taking a few steps, plaintiff’s foot got caught in an uncovered drain hole in the floor, and she fell face first, sustaining severe injuries.

Plaintiff’s complaint alleged defendant was negligent, that while in control of the premises, defendant failed to maintain them in a safe manner, and failed to warn of the dangerous condition created by the open drain. Defendant moved for summary disposition under MCR 2.116(C)(10) on the basis that the drain was open and obvious. The circuit court concluded that there were special aspects that made the condition unreasonably dangerous. We agree, and affirm.

This Court reviews rulings on motions for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). Summary disposition is proper if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

Even though a condition is open and obvious, a premises possessor may still have a duty to protect an invitee if there are special aspects of a condition that make it unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Only those special aspects that give rise to either (1) a uniquely high likelihood of harm; or (2) severity of harm if the risk is not avoided, will serve to remove a condition from the open and obvious doctrine. *Id.* at 519. “Typical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects.” *Id.* at 520.

Plaintiff’s fall occurred in the “meat room,” an enclosed room holding equipment including meat saws, cutters, and wrappers, and meat trays. Meat stockers such as plaintiff go in and out of the meat room to restock the store’s meat counters. A number of employees, including meat cutters and wrappers work in the meat room.

Photographs of and a diagram of the meat room submitted below depict that the uncovered drain hole that caused plaintiff’s fall was directly in the only available route that meat department employees had, and was located four to six feet from the double doors leading into the meat room, and that the drain was around a slight bend, at which a meat saw stood.¹

Plaintiff testified that she had been employed in the meat department since August 1995, first as a meat wrapper, and then as a meat stocker. Plaintiff testified that she reported for work at 8:00 a.m. on April 24, 2002, and walked through the meat room when she first arrived at work. Plaintiff testified that when she walked through the meat room at 8:00 a.m., there was no indication or sign indicating that the drains were to be worked on that day, nor were defendant’s workers in the area. Plaintiff also testified that she was not advised that the drains would be worked on that day.

On the day in question, plaintiff’s manager assigned her to the fresh meat counter because the staff there was short-handed. Plaintiff testified that she worked behind the fresh meat counter the whole day, until around 2:00 p.m., when she made her first trip back into the meat room, carrying a pork chop on a meat tray and intending to fill the tray with meats to restock the fresh meat counter. Plaintiff estimated that the tray she was carrying measured approximately 18” by 6”,² and testified that she was carrying it in her right hand. She went through the double doors to the meat room, took about five steps, and fell face first onto the floor, her foot having gotten caught in a drain hole that had been left uncovered. Plaintiff testified “I went through the double doors. I had the tray in my hand. I hollered to the meat cutter I needed some pork chops. The next I remember I’m laying face first on the floor.” Plaintiff testified, and photographs of the meat room and drain submitted below support, that the drain in question was perfectly level

¹ Although photographs submitted below indicate that there was some room on either side of the drain, it is clear that the space was limited and plaintiff testified that employees were not supposed to walk right by the equipment which stood at either side of the drain.

² A photograph of meat trays submitted to the circuit court, with a yardstick along side indicates the trays measure more than 2 ½ feet in length. It is unclear whether plaintiff’s tray was of this measurement or of smaller dimension.

with the floor. Plaintiff testified that she did not see the uncovered drain before she fell down because of the tray she was carrying, and added that her work is fast-paced, and that at the time of her fall she needed to refill the tray and get back to the meat counter, because there was a customer waiting to be attended. Plaintiff testified that after she fell she saw that the cover to the drain that caused her fall was “setting out away from” the drain, so that “the hole was just completely uncovered.” Plaintiff testified that when she fell, she “caught the meat wrapper’s cart and she had trays on it. All I heard was trays falling, and I took all the trays off of her cart with my arm.” Plaintiff testified that the meat wrapper’s cart stood next to the meat wrapper equipment, and held long trays, where meat is placed as it comes off wrapped and priced.

Under these circumstances, we agree with the circuit court³ that defendant was not entitled to summary disposition because a question of fact remained whether special aspects of the drain gave rise to a uniquely high likelihood of harm, and thus removed that condition from the open and obvious doctrine.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Peter D. O’Connell

³ The circuit court’s opinion states in pertinent part:

Defendant created the condition but failed to warn Plaintiff verbally or put up a cone or barricade around the condition. Further, there are special aspects surrounding the condition such as the close proximity of the drain to the door; coupled with the nature of Plaintiff’s work, i.e., she was carrying a large empty meat tray thus possibly obstructing her view. Finally, Plaintiff testified the path she took was the only path Plaintiff could take.